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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 TRAVIS RYAN KLUTTS,

12 Plaintiff,

13 v.

14 FEDERAL BUREAU OF PRISONS, et
15 al.,

16 Defendants.
17

Case No. ED CV 17-220-DOC (SP)

MEMORANDUM AND ORDER
DISMISSING ACTION FOR FAILURE
TO PROSECUTE

18
19 I.

20 **PROCEEDINGS**

21 On February 6, 2017, plaintiff Travis Klutts, a federal prisoner proceeding pro se
22 and in forma pauperis, filed a civil rights complaint under *Bivens v. Six Unknown Named*
23 *Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619
24 (1971). In the complaint, plaintiff alleged he had been held in segregated housing since
25 November 2013 without a disciplinary hearing in violation of his due process right and
26 his Eighth Amendment right to be free of cruel and unusual punishment.

27 Plaintiff filed two notices of change of address on February 27, 2017, and on
28 March 13, 2017, and filed a request to proceed without prepayment of filing fees on April

1 10, 2017, which the Court granted. Thereafter, in accordance with the terms of the Prison
2 Litigation Reform Act of 1995 (“PLRA”), the Court screened the complaint for purposes
3 of determining whether the action was frivolous or malicious, or failed to state a claim on
4 which relief might be granted, or sought monetary relief against a defendant who was
5 immune from such relief. *See* 28 U.S.C. § 1915(e)(2).

6 After careful review and consideration of the allegations of the complaint under the
7 relevant standards, the Court found that its allegations were insufficient to state a federal
8 civil rights claim. Specifically, the Court found that: (1) the complaint cannot state a
9 federal civil rights claim against the Bureau of Prisons or the United States Penitentiary at
10 Victorville, or against any defendant in his official capacity; (2) the complaint does not
11 state an Eighth Amendment claim for cruel and unusual punishment; and (3) the
12 complaint does not state a Fourteenth Amendment due process claim. Accordingly, on
13 September 6, 2017, the Court issued an Order dismissing the complaint with leave to
14 amend. If plaintiff wished to pursue this action, he was ordered to file a First Amended
15 Complaint by October 6, 2017, curing the enumerated deficiencies. The Order expressly
16 admonished plaintiff that, if he failed to timely file a First Amended Complaint, the Court
17 may recommend that this action be dismissed.

18 Plaintiff failed to file a First Amended Complaint by the October 6, 2017 deadline.
19 Accordingly, on October 30, 2017, the Court issued an Order to Show Cause Why the
20 Complaint Should Not Be Dismissed For Failure to Prosecute (“OSC”). Plaintiff was
21 ordered to respond to the OSC by November 20, 2017, and either show cause why the
22 action should not be dismissed or, in the alternative, file a First Amended Complaint.
23 The Court cautioned plaintiff that his failure to timely respond to the OSC would be
24 deemed by the Court as consent to the dismissal of this action without prejudice.

25 Plaintiff did not respond to the OSC by the November 20, 2017 deadline as
26 ordered, and has not filed a First Amended Complaint or otherwise communicated with
27 the Court since.

1 II.

2 **DISCUSSION**

3 The complaint filed by plaintiff herein suffered from the pleading deficiencies
4 discussed in the Court's September 6, 2017 Order Dismissing Complaint With Leave to
5 Amend. When plaintiff failed to file a First Amended Complaint, the Court issued an
6 OSC giving him an opportunity to show cause for his failure to prosecute or to discharge
7 the OSC by filing a First Amended Complaint, and warning plaintiff that failure to
8 comply with the Court's order would be deemed by the Court as consent to the dismissal
9 of this action. Plaintiff has failed to file a First Amended Complaint remedying the
10 original complaint's deficiencies, and has failed to respond to the OSC by the deadline to
11 do so, or at all. Plaintiff's failure to file a First Amended Complaint, or to otherwise
12 respond to the Court's October 30, 2017 OSC, despite being admonished of the
13 consequences, evidences a lack of prosecution on his part.

14 It is well established that a district court has authority to dismiss a plaintiff's action
15 because of his or her failure to prosecute or to comply with court orders. *See* Fed. R. Civ.
16 P. 41(b); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-30, 82 S. Ct. 1386, 8 L. Ed. 2d 734
17 (1962) (a court's authority to dismiss for lack of prosecution is necessary to prevent
18 undue delays in the disposition of pending cases and to avoid congestion in the calendars
19 of the district courts); *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002) (weighing
20 factors); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992) (a district court may
21 dismiss an action for failure to comply with any order of the court).

22 In *Carey v. King*, 856 F.2d 1439, 1441 (9th Cir. 1988), the Ninth Circuit affirmed
23 the district court's dismissal of a case for failure to prosecute. The Ninth Circuit cited the
24 following factors as relevant to the district court's determination of whether dismissal of
25 a pro se plaintiff's action for failure to prosecute is warranted: "(1) the public's interest
26 in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the
27 risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on
28 their merits and (5) the availability of less drastic sanctions.'" *Id.* at 1440 (quoting

1 *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986)).

2 In this case, plaintiff has failed to file a First Amended Complaint as directed and
3 failed to respond to the Court's October 30, 2017 OSC. Plaintiff's failure to follow the
4 Court's orders and to prosecute his case has caused this action to languish, impermissibly
5 allowing plaintiff to control the pace of the docket rather than the Court. *See Pagtalunan*,
6 291 F.3d at 642 ("It is incumbent upon the Court to manage its docket without being
7 subject to routine noncompliance of litigants."). Plaintiff's conduct indicates that he does
8 not intend to litigate this action diligently, or at all. Thus, the first and second factors
9 weigh in favor of dismissal. *See Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th
10 Cir. 1999) ("[T]he public's interest in expeditious resolution of litigation always favors
11 dismissal.").

12 A rebuttable presumption of prejudice to defendants arises when a plaintiff
13 unreasonably delays prosecution of an action. *See In re Eisen*, 31 F.3d 1447, 1452-53
14 (9th Cir. 1994). Nothing suggests that the presumption of prejudice to defendant is
15 unwarranted here. Where a party offers a poor excuse for failing to comply with a court's
16 order, the prejudice to the opposing parties is sufficient to favor dismissal. *See Yourish*,
17 191 F.3d at 991-92. Here, plaintiff has not offered any excuse for his failure to comply
18 with the Court's orders. Further, "[u]nnecessary delay inherently increases the risk that
19 witnesses' memories will fade and evidence will become stale." *Pagtalunan*, 291 F.3d at
20 643 (citing *Sibron v. New York*, 392 U.S. 40, 57, 88 S. Ct. 1889, 20 L. Ed. 2d 917
21 (1968)). Thus, the third factor also weighs in favor of dismissal.

22 It is a plaintiff's responsibility to move a case toward a disposition at a reasonable
23 pace and to avoid dilatory and evasive tactics. *See Morris v. Morgan Stanley & Co.*, 942
24 F.2d 648, 652 (9th Cir. 1991). By failing to file a First Amended Complaint, or to
25 respond to the Court's October 30, 2017 OSC, plaintiff has not discharged this
26 responsibility. In these circumstances, the public policy favoring resolution of disputes
27 on the merits does not outweigh plaintiff's failure to comply with court orders or move
28 the case forward.

1 The fifth factor, the availability of less drastic sanctions, ordinarily counsels
2 against dismissal. “Alternative sanctions include: a warning, a formal reprimand, placing
3 the case at the bottom of the calendar, a fine, the imposition of costs or attorney fees, the
4 temporary suspension of the culpable counsel from practice before the court, . . .
5 dismissal of the suit unless new counsel is secured [,] . . . preclusion of claims or
6 defenses, or the imposition of fees and costs upon plaintiff’s counsel. . .” *Malone v. U.S.*
7 *Postal Serv.*, 833 F.2d 128, 132 n.1 (9th Cir. 1987) (citation and internal quotation
8 omitted). In the instant case, however, each of these possibilities is either inappropriate
9 for a pro se litigant proceeding in forma pauperis under the PLRA or has already been
10 employed with no apparent effect.

11 The Court attempted to avoid dismissal by: (1) waiting more than three weeks
12 beyond plaintiff’s deadline to file a First Amended Complaint before issuing an OSC, in
13 which the Court warned plaintiff that failure to timely respond to the OSC would be
14 deemed by the Court as consent to dismissal of the action; and (2) waiting two months
15 beyond the deadline to respond to the OSC before issuing this order. Both of these
16 actions by the Court took place after plaintiff was in noncompliance with a court order.
17 *See Pagtalunan*, 291 F.3d at 643 & n.4 (citing *Yourish*, 191 F.3d at 992, for the
18 proposition that pursuit of less drastic alternatives prior to a party’s noncompliance with
19 court order will not satisfy factor, despite implied holdings of earlier cases). Plaintiff has
20 not communicated with the Court in any fashion since May 2017. Further, dismissal
21 without prejudice is less drastic than dismissal with prejudice. As there appears to be no
22 less drastic sanction than dismissal without prejudice now available, the fifth factor
23 weighs in favor of dismissal.

24 Based on the foregoing, dismissal of this action without prejudice is warranted for
25 failure to prosecute and to obey court orders.

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DATED: January 24, 2018

Presented by: